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THE JEWS AND THE ENGLISH LAW.

IV.

HAVING already passed in review the law in its bearing on the Jewish religion and endowments founded for the purpose of propagating that religion, as well as the conditions under which Jews are entitled to a share of general endowments and charities, the laws concerning the civil and political status of the Jews next claim attention. For a period of more than three and a half centuries Jews were not permitted to live in England, nor is the date when they were first allowed to settle here by any means certain. However, in considering the course of legislation, so far as it concerns the Jews, the time of their legal recognition of their resettlement is of great importance, and was much discussed in the recent case of Dr. Wilton *v.* Montefiore, where Mr. Justice, now Lord Justice Stirling, decided it to be November 13, 1685. The words of the learned judge are: "The history of the Jews in this country, so far as it is material to the present question, is given in a note to the report of Lindo *v.* Belisario[1]. After stating that the Jews appeared to have been brought here in considerable numbers by

[1] 1 Hag. Cons. 216.

William I from Rouen in 1070, and that they lived as bondsmen of the kings, and under special protection, regulations, and exemptions, till they were banished in 1290, the note proceeds as follows: 'They did not appear again in this kingdom as a distinct body[1] till the time of Charles II. They had petitioned in 1648 to be allowed to return and enjoy their religion, and the question was much agitated but nothing was done. On the Restoration, Charles II promised them protection and the use of their religion, and an order of Council issued to that effect.' The order is given in the Appendix, p. 3. It is dated November 13, 1685, and it provides as follows: 'Upon reading this day at the board the petition of Joseph Henriques, Abraham Delivera, and Aaron Pacheco, overseers of the Jewish synagogue, and the rest of the Jewish nation, setting forth that his late Majesty, of blessed memory, having found the petitioners and their nation ever faithful to the government, and ready to serve him on all occasions, was pleased in February, 1673, to signify his royal pleasure, that whilst they continued quiet, true, and faithful to the government, they should enjoy the liberty and profession of their religion, which they accordingly peaceably exercised till Michaelmas Term last; that several writs out of the King's Bench, on the statute made in the twenty-third year of Queen Elizabeth, had been taken out against forty-eight of the Jewish nation by one Thomas Beaumont, and thirty-seven of them arrested thereupon, as they were following their occasions on the Royal Exchange, to the great prejudice of their reputation both here and abroad; and therefore praying his Majesty to permit and suffer them, as heretofore, to have the benefit and free exercise of their religion during their good behaviour towards his Majesty's government. His Majesty having taken this matter into his royal consideration, was pleased to order, and it is hereby accordingly ordered, that

[1] By these words Dr. Haggard probably means having a synagogue and communal organization and openly practising their religion.

his Majesty's Attorney-General do stop all the said proceedings at law against the petitioners; his Majesty's intention being that they should not be troubled upon this account, but quietly enjoy the free exercise of their religion, whilst they behave themselves dutifully and obediently to his government.' From that time forward the Jews appear to have been permitted to reside in England and to practise the rites of their religion[1]."

This date, November 13, 1685, in the reign of James II, is inconsistent with the popular theory that the Jews came over during the Protectorate of Oliver Cromwell in the wake of their great Rabbi, Menasseh Ben Israel, in the year 1655, and have been legally settled here ever since, nor is it much less at variance with the view of the historians, that the Jews obtained a legal settlement in England sometime during the reign of Charles II, though the precise date is not given. The true date is of some importance when the course of subsequent legislation as it affects the Jews is placed under review; and as much may be said on behalf of either theory, and as the legal theory is not necessarily correct, it will not be out of place to summarize the evidence upon which the rival theories are based, so that the reader may be enabled to form an impartial judgment on the subject under discussion. Here it will be necessary to travel outside the contents of the statute book and the law reports, and to extract, though it is to be hoped not at undue length, certain entries in the public records. It must not of course be forgotten that an actual settlement is one thing, and the legal recognition of it another. The former must necessarily precede the latter. The date adopted in Mr. Justice Stirling's judgment is therefore a late one, and in reality marks the last occasion on which a serious attempt was made in due form of law to prevent the Jews who had already an organized community from continuing their residence in the country.

[1] Law Reports [1900], 2 Ch. 489.

In order to understand the conditions for the solution of this problem, it is necessary to glance at the previous history of the Jews in this country. There can be little doubt that from the earliest times, that is, ever since England may be said to have come within the pale of civilization, Jews, prompted by that commercial instinct which has always been their characteristic, came here for the purposes of trade, and reaped the profits to be derived from it, and even settled here, though probably not in such considerable numbers as to establish distinct communities of their own until the connexion between England and the continent of Europe became closer by reason of the Norman Conquest and the events immediately preceding it. Therefore though there are at the present day few or no traces remaining of any Jewish settlements in England prior to the time of the Norman kings, it is a mistake, founded upon a passage in Prynne's *Demurrer*, to assert that the residence of Jews in England was illegal before that time. Prynne's words[1] are: "I have deduced their introduction into England only from William surnamed the Conqueror, because I finde not the least mention of them in any of our British or Saxon Histories, Councils, Synods, Canons, which doubtlesse would have mentioned them, and made some strict Laws or Canons, against their Jewish as well as against Pagan Superstitions, had they exercised them here, as they would have done as well as in Spain, and other places, had they resided here." But apart from Edward the Confessor's law, the authenticity of which Prynne disputes, there are contained in the *Liber Poenitentialis* of Theodore, who was Archbishop of Canterbury from 668 to 690 A. D., and the *Excerptiones* of Ecbert, who was Archbishop of York from 735 to 766 A. D., a not inconsiderable number of canons and regulations relating to the Jews: e. g. it was provided that a Christian woman committing fornication with a Jew should undergo severer penalties than if guilty of the same offence with a Christian[2];

[1] Prynne's *Demurrer*, part I, p. 5.

[2] Theod. *Lib. P.*, XVI, § 35.

and that if any celebrated the feast of Passover with the Jews, he should be expelled from every church[1]; and that if any Christian received unleavened bread or any food or drink from the Jews, he should do penance on bread and water for forty days[2]; and that if a Christian were to sell another Christian, although his own slave, to Jews, he was to suffer severe penalties until he redeemed him[3]. Again, mass was not to be celebrated in any place where the bodies of Jews or infidels were buried[4], and no Christian was to turn Jew or take part in Jewish feasts[5].

However this may be, there can be no doubt that after the Norman Conquest separate Jewish communities were to be found in many of the more important towns. The Jews, or "Iudaei," as they were called, living in these communities, possessed a separate and distinct legal status. This status was very similar to that of the villein, with this distinction, that the Jew was not *ascriptus glebae*, and was in every case subject to the king, and not to the lord of the manor, as the villein was. It is well described in the twenty-fifth law of Edward the Confessor, which may be translated as follows: "All Jews, in whatever part of the kingdom they may be, are under the liege protection and guardianship of the king; nor can any of them attach himself to any rich man without the king's licence, because the Jews themselves and all their chattels are the king's. But if any one detains them or their chattels, the king may claim them as his own[6]." Such a status was consistent

[1] Theod. *Lib. P.*, XXX, § 4.
[2] Ibid., XLII, § 1.
[3] Ibid., § 4; Ecb. *Ex.* 150.
[4] Theod. *Lib. P.*, XLVII, § 1.
[5] Ecb. *Ex.* 147.
[6] As to this law Prynne says: "I cannot but reject it as counterfeit, and esteem it rather a Declaration of the Jews' condition in England in Hoveden's time (inserted by him, as well as some other things of punier date, amongst these Laws) rather than any Law of, or in the Confessor's days, wherein I can find no evidence of any Jews' residence here, but only this interpolation and forged Law, which Mr. Selden wholly omits in his Collection of his Laws." Hoveden lived in the reign of Henry II, and probably died in 1201 A.D.; and though Prynne thinks the law

with a large amount of freedom: as against all the king's subjects they were free and possessed of all the rights of freemen, but their persons and property were under the absolute control and disposition of the king, whose exactions were only restricted by that prudence which warns the owner not to slay the goose that lays the golden eggs. So important a source of revenue did the Jews become that a special court, the Exchequer of the Jews, was established in the reign of Richard I; this court had jurisdiction in all causes whether civil or criminal in which Jews were implicated; though purely civil cases in which both parties were Jews were frequently, if not generally, remitted to a purely Jewish tribunal, to be decided by Jewish and not by English law. The Jews were not popular; they were the licensed money-lenders of the land—in this trade they had an absolute monopoly[1]—and the creditor is rarely beloved by his debtor. The barons looked with jealous eyes on the Jews' wide privileges in relation to their fellow men; but it was not till towards the close of Henry III's long reign that their civil rights were materially abridged by statute, though they were always subject to such restrictions as the king in his discretion might think fit to impose. In the year 1271 a statute[2] was enacted prohibiting Jews from holding lands in fee (the houses they then possessed being expressly excepted), and also from having Christian servants, while about the year 1275 the famous statute *de la Jeuerie* or *de Iudaismo* was passed, which forbade usury to the Jews, and enjoined that every Jew should wear a yellow badge on his outer garment and pay a yearly tax of threepence to

spurious, he admits that it correctly represents the legal status of the Jews in the latter part of the twelfth century. See Bracton, f. 386 b. The law is now accepted as genuine, and is included in the Ancient Laws and Institutes of England printed under the direction of the Commissioners on the Public Records of the Kingdom in 1840.

[1] Usury was most strictly forbidden to Christians as being contrary to the law of God and of the land. See Co. 3 Inst., p. 251.

[2] Rymer's *Foedera*, I, 489.

the king; on the other hand, the Jews were to be under the king's protection, and might gain their living by lawful merchandise and labour, and might buy houses in the cities where they lived and hold them in chief of the king, and might take farms or land for the term of ten years or less. But the licence to take lands to farm was to endure for only fifteen years[1]. Such was the position of the Jews before their final departure from the country in 1290[2]. This event is accurately described in Stubbs's *Constitutional History*: "At the same time (as the July Parliament) by an act done by himself in his private council" ("per regem et secretum concilium," Hemingb. II, 20) "he banished the Jews from England: the safe-conduct granted them on their departure is dated on the 27th of July[3]." These safe-conducts are the most important documents still in existence relating to this event. The one referred to by Bishop Stubbs is addressed to all the bailiffs, barons, and shipowners of the Cinque Ports, commanding them that, inasmuch as a certain time has been fixed for all the Jews to quit the realm, to give them a safe passage for themselves, their wives, children, and chattels, and to charge them no more than the ordinary and accustomed freight, and enjoining them under pain of severe forfeiture from injuring or, so far as in them lay, allowing others to injure or molest any of the Jews in property or person[4].

[1] Statutes of the Realm, I, 221.

[2] For further detail the reader is referred to Pollock and Maitland's *History of English Law before the time of Edward I*, vol. I, pp. 451–459, and Gneist's *Constitutional History*, p. 228 note, and also *The Expulsion of the Jews from England in* 1290, by B. L. Abrahams, and the Introduction to the Jewish Historical and Selden Societies' edition of *Select Pleas*, Starrs, &c., by J. M. Rigg, which has appeared while these pages were in the press.

[3] Stubbs, *Const. Hist.*, II, 126.

[4] Rymer, *Foed.*, vol. I, part 2, p. 736. Coke gives from the Close Rolls a similar writ addressed to the sheriff of G. and dated July 18, 1290. Inst., II, p. 507, and see Tovey's *Ang. Iudaica*, p. 241, and at p. 232 the entry in the Red Book of the Exchequer is given.

The decree of banishment itself is no longer extant, but Dr. C. Gross has discovered a document which throws much light upon it. This document is in the form of a writ issued from King's Clipstone on November 5, 1290, and addressed to the Treasurer and Barons of the Exchequer. It recites that though by the statute passed at Westminster (the statute *de Iudaismo*) the Jews had been forbidden to take usury of any Christian, nevertheless they still exacted interest under the name of "courtesy[1]," and thereby oppressed the people; wherefore on account of their crimes and in honour of Christ, the king had compelled them to quit the realm as being perjured, and proceeds to order that no penalty or interest should be exacted in respect of debts due to the Jews, and that the debtors should pay only the principal moneys they had actually received from the Jews[2]. The exile of the Jews did not annul debts due to them, but such debts became payable to the king, whose bondmen the Jews had been. They had been ordered to leave the kingdom before a fixed time, which is not stated in any of the documents, but is generally believed to be the first of November[3]; the writ in question was therefore issued immediately after their final departure.

In consideration of having issued this decree of banishment, the Parliament which was then sitting, composed as it was in a great measure of landowners to whom Jewish usury had been a heavy burden, granted the king a fifteenth "pro expulsione Iudaeorum." But the transaction was not a very profitable one to the crown, for by it a plenteous

[1] The original word is *curialitas*, which is quite distinct from the "curialitas Angliae" or interest which the husband has in his wife's freehold land. It probably does not occur elsewhere in this sense in mediaeval jurisprudence, and is not to be found among the terms explained in "Termes de la ley." It is used in the *Corpus iuris*, but with a very different meaning. *Novell. Valentinian.* tit. 3, § 3.

[2] Add. MSS., Mus. Brit. 32,085, fol. 122, *Publications of the Anglo-Jewish Historical Exhibition*, I, 229; Rigg, *Select Pleas*, pp. xl-xlii.

[3] Mathew of Westminster, a contemporary chronicler, says the king had allowed them to stay till the Feast of All Saints (Tovey, p. 233).

source of the revenue was for ever cut off, and that at a time when the king was expected to defray the ordinary expenses of the state out of his hereditary revenues, and subsidies were only voted by the Parliament on special and extraordinary occasions. Yet in the year 1290 this source could not be expected to yield as rich a harvest as it had done in former days. The prohibition of usury in the third year of Edward I, even if occasionally evaded, had greatly diminished the resources of the Jews, and the licence to take lands to farm, which was to endure for only fifteen years, was now about to expire, and thus another road to the acquisition of wealth was closed to them. Had they been allowed to remain, the Jews hampered by these restrictions imposed by Act of Parliament, and therefore removable only by Act of Parliament, would no longer have been as profitable to the king as they had been in former times, when, in the words of Lord Coke, "a great revenue by reason of the usury of the Jews came to the crown; for between the fiftieth year of Henry III and the second year of Edward I, which was not above seven years complete, there was paid into the king's coffers four hundred and twenty thousand pounds of and for the usury of the Jews[1]." This is a truly enormous sum, having regard to the value of money and the total wealth of the country in the thirteenth century. But after the statute *de Iudaismo* such rich harvests were no longer to be reaped, and in all probability this knowledge had considerable influence on the king's mind, in addition to the proffered gift of a fifteenth by the Parliament and the knowledge that a great part of the property still remaining to the Jews would come to him by way of escheats[2].

[1] 3 Inst., 151.

[2] Madox, *History of the Exchequer*, p. 261. See note r. "MCCLXXXX eiecti sunt Iudaei ab Anglia cum facultatibus suis; salvis cartis Christianorum penes Dominum Regem residentibus," ex Cod. Vet. MS. (*Annals of the Church of St. Augustine at Canterbury*), 4. 7, p. 102. At p. 221 Mr. Madox says: "The King of England was wont to draw a considerable Revenue from the Jews residing in this Realm: namely, by Tallages, by Fines

Looking back over the gulf of centuries, this event can be descried with sufficient clearness, but the loss of the proclamation of banishment has left it wrapped in some obscurity that has given rise to several erroneous theories that should here be mentioned. Lord Coke says that there was no banishment of the Jews, but only a voluntary exodus in consequence of the suppression of usury. "Our noble King Edward I and his father Henry III before him sought by divers Acts and Ordinances to use some mean and moderation herein, but in the end it was found that there was no mean in mischief, and as Seneca saith, 'Res profecto stulta est nequitiae modus.' And therefore King Edward I, as this Act" (the statute *de Iudaismo*) "saith, in the honour of God, and for the common profit of his people, without all respect (in respect of these) of the filling of his own coffers, did ordain, that no Jew from henceforth should make any bargain or contract for usury, nor upon any former contract should take any usury, from the Feast of Saint Edward then last past; so in effect all Jewish usury was forbidden."

"This Law struck at the root of this pestilent weed, for hereby usury itself was forbidden; and thereupon the cruel Jews thirsting after wicked gain, to the number of

relating to Law-proceedings, by Amerciaments imposed on them for Misdemeanour, and by the Fines, Ransoms and Compositions, which they were forced to pay, for having the King's Benevolence, for Protection, for Licence to trade and negotiate, for Discharges from Imprisonment, and the like. He would tallage the whole Community or Body of them at Pleasure; and make them answer the Tallages for one another. If they made Default at the Atterminations or Days of Payment prefixed to them, they were charged with great Fines or Compositions for it. In Sum, the King seemed to be absolute Lord of their Estates and Effects, and of the Persons of them, their Wives and Children. 'Tis true, he let them enjoy their Trade and bequests; but they seemed to trade and acquire for his Profit as well as their own: for at one Time or other, their Fortunes or great part of them came into his Coffers. They were a numerous Body (being settled in many, especially the great Towns of the Realm): and by Traffic and taking of usuries and mortgages of the King's subjects, they became very wealthy both in Money and Land. But as they fleeced the subjects of the Realm, so the King fleeced them."

15,060 departed out of this Realm into foreign parts, where they might use their Jewish trade of usury, and from that time that Nation never returned again into this Realm. Some are of opinion (and so it is said in some of our Histories) that it was decreed by authority of Parliament, That the usurious Jews should be banished out of the Realm; but the truth is, that their Usury was banished by this Act of Parliament, and that was the cause that they banished themselves into forein Countries, where they might live by their Usury; and for that they were odious both to God and man, that they might passe out of the Realm in safety, they made Petition to the King, that a certain day might be prefixed to them to depart the Realm, to the end that they might have the King's Writ to his Sherifes for their safe conduct, and that no injury, molestation, damage or grievance be offered to them in the mean time[1]."

Coke's error is due to his post-dating the statute *de Iudaismo*, and attributing it to the Parliament of 1290. It is still placed among the statutes of uncertain date by the commissioners responsible for the statutes of the realm. In the Harleian MS. it immediately succeeds the Statute of Westminster I, passed in the third year of Edward I, and in the document discovered by Dr. Gross at the British Museum it is stated to have been enacted "in quindena Sancti Michaelis anno regni nostri tertio"; so that the date is now placed beyond all doubt[2]. The basis of Coke's theory is thus destroyed.

Prynne, on the other hand, is very positive that the banishment was effected by Act of Parliament; his words are: "This their banishment was by the unanimous desire, Judgment, Edict, and Decree both of the King and his Parliament; and not by the King alone: and this Banishment, total, of them all, and likewise final, never to return

[1] 2 Inst., 507.

[2] Add. MSS., Mus. Brit., 32,085, fol. 122. Prynne in his *Demurrer*, at p. 34, places the statute in the year 1287, but in his *Records*, vol. III, p. 153, he attributes it to 4 Edw. I.

into England. Which Edict and Decree not now extant in our Parliament Rolls (many of which are lost) nor printed Statutes; yet it is mentioned by all these Authorities[1]." Prynne here alludes to different chroniclers, extracts from whose works he had already given; but these extracts when carefully examined do not bear out his assertion.

This view held by Prynne was undoubtedly very widely spread, and at one time held by both the supporters and opponents of the Jews' readmission; for the first petition presented on behalf of the Jews to the Council of War on Jan. 5, $164\frac{8}{9}$, some seven years before Prynne wrote his *Demurrer*, is entitled, "The petition of the Jews for the repealing of the Act of Parliament for their Banishment out of England," and speaks of the instrument of expulsion as "the inhumane, cruel statute of banishment." But those responsible for this petition seem to have been but ill acquainted with English history and jurisprudence, for the banishment is said to have taken place in the reign of Richard II[2]. Prynne has the candour and honesty to admit that the alleged statute was no longer in existence, but "B. B.," the anonymous author of *A Historical and Law Treatise against the Jews and Judaism*, a virulent diatribe against the Jews, published in 1703, which was so popular with the anti-Semites here that it was reprinted in 1721 and again in 1753 as the second edition—perceiving the weakness of this theory on account of the total disappearance of the alleged statute, unblushingly asserts that it is to be seen on the Roll of Parliament in the Tower. From internal evidence it is clear that this writer had carefully studied Prynne's *Demurrer*, and it is impossible to escape the conclusion that his statement is a wilful falsehood, made in reliance on the improbability of any of his readers taking the pains to verify it. Prynne was above such a statement as this, but feeling that the authorities he had cited were not conclusive, and fearing

[1] *Demurrer*, p. 49.

[2] Hag., *Cons. Cas.*, I, Ap. No. 1.

that the term "groundless conceit," which he had applied to Sir Edward Coke's theory, might with equal justice be applied to his own, he concludes his argument with the statement that by the fundamental laws of England, "No Freemen and Natives of England can be justly banished or exiled out of it but by special judgment of Parliament, or by Act of Parliament," as authority for which he cites Magna Charta, c. 29, and a large number of Acts of Parliament banishing individuals at various times. Therefore, he says, the Jews being banished by Act of Parliament "(never since repealed or reversed) neither may nor can by Law be readmitted, reduced into England again, but by common consent and Act of Parliament: which I conceive they will never be able to obtain[1]." It can hardly be denied that Prynne was carried away with excessive zeal to make good the proposition, to prove which he had sat down to write his *Demurrer*. He had, as he says in his "Preface to the Christian Reader," been asked by Mr. Nye, the minister, "whether there were any law of England against bringing in the Jews amongst us? for the Lawyers had newly delivered their opinions, there was no law against it." To which he had answered "That the Jews were in the year 1290 all banished out of England, by Judgment and Edict of the King and Parliament, as a great Grievance, never to return again: for which the Commons gave the King the fifteenth part of their Moveables: and therefore being thus banished by Parliament, they could not now by the Laws of England, be brought in again, without a special Act of Parliament, which I would make good for Law." The conference to consider the demands of Menasseh ben Israel was still sitting at Whitehall, and party feeling ran high; otherwise so sound a lawyer as Prynne would not have overlooked the fact that the famous clause of Magna Charta applies only to freemen, and that in the year 1290 no Jew could claim to be a *liber homo*. As has been already shown, the Jews

[1] *Demurrer*, p. 50.

were serfs or villeins, and by the statute *de Iudaismo* passed only fifteen years before, the privilege had been granted to them of not being challenged or troubled in any court, except in the court of the King, "whose Bondmen they are" ("ky serfs yl sunt"). The Jews consequently had no right to the benefit of Magna Charta or any other fundamental law of the land that applied to freemen only, and could accordingly be banished, as in fact they were, by decree of the King alone. There is yet a third theory of the expulsion which need be but briefly mentioned here. It is that sentence of exile was passed upon the Jews by a synod held in London. This does not rest on very strong authority, and it is certain that the clergy, whatever their wishes might have been, had no legal power to effect the expulsion of the Jews[1].

It has been lately suggested that in spite of the decree of banishment and the severe penalties which disobedience to that decree would undoubtedly have entailed, some Jews still remained in this country. The suggestion is based upon little trustworthy evidence, and does not call for any comment here; for if any did remain they were very soon amalgamated with and became indistinguishable from the general mass of the population. Then, again, as the centuries rolled on individual Jews from time to time can be proved to have landed on our shores, but they never attempted to establish a Jewish community here or to celebrate their worship publicly in this country; they were treated as other foreigners and subject to the laws which governed aliens[2]. It is therefore true to say that for a period of more than three centuries English history is a blank so far as the Jews are concerned; but in that long interval occurred two events of great importance in relation to the return of the Jews here. Those events

[1] See Wilkins's *Concilia*, II, p. 180; Pike, *History of Crime*, vol. I, p. 465.

[2] See "The Middle Age of Anglo-Jewish History," by L. Wolf, in *Publications of the Anglo-Jewish Historical Exhibition*, vol. I, and other works there cited.

were the extinction of villenage and the reformation of the English Church.

The disappearance of villenage is one of those great changes which has been brought about without the intervention of the legislature. To a great extent this result was effected by the attitude of the courts of common law, which admitted every presumption in favour of liberty, and in practice made it difficult and finally impossible to sustain a claim to a villein, if it was seriously contested. The last reported case in which villenage was pleaded was tried in Hilary Term, 1617 (15 Ja. I), and, as in numerous other instances, the claim was not upheld[1]. From the 15th of James I, says Mr. Hargrave in his learned argument in Sommersett's case, "the claim of villenage has not been heard of in our courts of justice; and nothing can be more notorious, than that the race of persons, who were once the objects of it, was about that time completely worn out by the continual and united operation of deaths and manumissions[2]." Had the case of the Jews occurred to him, he might have added banishment also. Villenage had thus become obsolete, but the laws and rules relating to villenage had never been repealed, and by these laws the sovereign as much as the private citizen was bound; therefore if Queen Elizabeth had laid claim to Rodrigo Lopez as her villein, it would have been necessary for her to prove either that Lopez had made confession that he was her villein in a court of record, or that he and his ancestors had been villeins to herself and her predecessors time out of memory—that is to say, for a period of sixty years, as limited by 32 Hen. VIII, cap. 2. Such proof would obviously not have been forthcoming, and no such claim was ever made by any of our sovereigns against those Jews who from time to time landed on our shores. But if they were not villeins then the disabling statutes enacted before

[1] Pigg *v.* Caley, Noy 27.

[2] J. O. Howell's *State Trials*, p. 41.

the expulsion did not apply to those Jews who might return and reside here. The disabling acts no doubt applied to "Iudaei" or Jews, nor were any exceptions made in the statutes, but the Jews who came back to England in the seventeenth century were free men; they were no longer villeins or quasi-villeins, and were not "Iudaei" within the meaning of the Acts. This principle of interpretation is well known to English law, and after much discussion and considerable disagreement among our greatest judges as to its application, was acted on in a recent case in which it was held that the enclosure at Kempton Park was not a place within the meaning of the Betting Act[1]. In that case reliance had to be placed on the preamble of the Act, and also upon extrinsic evidence of the circumstances existing at the time when the Act was passed, and it was the necessity of going outside the words of the statute itself which occasioned the difference of opinion among the judges; but in the very body of the statute *de Iudaismo*, the Jews, as has been already pointed out, are repeatedly called the King's bondmen, and therefore this difficulty would not arise. Certain it is that many generations of Jews lived in this country in open and flagrant violation of these obsolete statutes. They did not wear yellow badges on their outer garments; they employed Christian servants, and in some cases they did put out money to usury and held lands and houses; and yet no attempt was ever made to enforce the laws prohibiting such things, and that though, as contemporary pamphlets prove, there were undoubtedly many persons willing, nay eager, to annoy and injure the Jews had it been in their power. And yet in the year 1846 it was thought advisable to solemnly repeal by Act of Parliament "the Statute or Ordinance of the fifty-fourth and fifty-fifth years of the reign of King Henry the Third, and the Statute or Ordinance commonly called *Statutum*

[1] Powell *v.* The Kempton Park Racecourse Company, Limited, [1897] 2 Q. B., 242, and [1899] A. C., 143.

de Iudaismo[1]." If the view here stated is correct this was a work of supererogation, but in any case if there ever existed any doubt after the resettlement as to the absolute freedom and equality of the Jews with their fellow citizens before the law, it has now been removed.

Much as the decay of villenage might have facilitated the return of the Jews by rendering the former disabling enactments no longer applicable to them, the various laws passed in consequence of the Reformation of the English Church and the events which immediately preceded and led up to it were no less effective in retarding a resettlement. These laws may be classified under two heads: (1) those constituting the proclamation, teaching, or propagation of doctrines at variance or inconsistent with the tenets held for the time being by the Church as by law established, a criminal offence—the law of heresy; (2) those making criminal, failure to attend the service of the Church as by law established, and also the attendance at services other than those of the Established Church—the law of uniformity, to a great extent embodied in the statutes known as the laws against recusants.

At the time of the expulsion of the Jews, and indeed until the days of Wycliffe and the rise of the Lollards nearly a century afterwards, heresy was almost unknown in England; and if there was any legal machinery other than excommunication and ecclesiastical censure, by which such a crime could be punished, there were but few occasions when it was brought into operation, and the fact that Wycliffe and his earlier disciples escaped all temporal penalties goes far to show that though heresy even in those times was regarded as a heinous crime, there was no regular procedure by which those tainted with it could be brought to justice and punished. In any case the Jews, who had lived here as the King's villeins and under the special protection of the King, had not been liable to be charged with heresy; but if they converted a Christian

[1] 9 & 10 Vict. cap. 59.

to their religion, the apostate would have been treated with extreme rigour. Perhaps the best-authenticated case of capital punishment for heresy before the year 1400 A.D. is that of a deacon who in the year 1222, because he had become a Jew for the love of a Jewess ("pro quadam Iudaea"), was degraded by Stephen Langton, Archbishop of Canterbury, at a provincial council held at Oxford, and then delivered over to the sheriff as representing the civil power and forthwith burned[1]. There is grave doubt as to the legality of the latter part of this punishment; there seems to have been no sort of judicial proceeding of any kind when once the unfortunate cleric was handed over to the civil power; nor can it be determined under what precise enactment the capital punishment was ordered, and the sheriff who carried it out was Fawkes of Breauté, a man notorious for high-handed and lawless acts of violence. The infliction of the death penalty for heresy was, however, common on the continent, and this particular case (the offence being a flagrant one), though viewed with surprise by contemporaries, seems to have met with general approval. It cannot, however, be taken as an authority that heresy would in ordinary cases be visited with severe temporal punishment. The impotence of the law is made manifest by the complete failure of the measures taken against Wycliffe and his followers, and in May of the year 1382, when the Wycliffite controversy was at its height, the clergy actually managed to fraudulently introduce into the statute book an ordinance enabling the arrest and imprisonment of heretics; but in October of the same year the Commons represented to the King that the pretended statute had never received their assent and it was accordingly repealed[2]. Wycliffe, the arch-heretic,

[1] Bracton, f. 124, vol. II, p. 300. Ann. Wykes, p. 63. Matthew Paris, vol. III, p. 71, says he was hanged. See Maitland, *Canon Law in the Church of England*, pp. 158–179.

[2] The statute is 5 Rich. II, stat. 2, cap. 5. See *Statutes of the Realm*, II, p. 25; *Rot. Parl.* III, 125 and 141; "The case of Heresy," 12 *Rep.* 56.

was allowed to die a natural death, and it was not until the beginning of the reign of Henry IV that a thoroughly reliable weapon for the suppression of heresy was placed in the hands of the Church. In the year 1401 the famous statute *de Haeretico* was passed; it enacted that no one should preach or write contrary to the Catholic faith or determination of holy church, or hold any conventicles or schools for teaching such doctrines, or favour or maintain any such teacher, and it empowered the diocesan to cause any one "defamed or evidently suspected" of being guilty of any of the offences enumerated in the statute to be arrested and detained in prison until he should canonically purge himself and abjure his heretical and erroneous opinions. The diocesan was to openly and judicially proceed against him according to the canonical decrees within three months of the arrest, and if he were convicted he was to be imprisoned and fined after the "manner and quality of the offence" at the discretion of the diocesan, but if he should refuse to abjure or after abjuration should relapse, so that according to the holy canons he ought to be left to the secular court, then he is to be handed over to the sheriff or other proper officer who shall receive him and "before the People in a high place do to be burnt[1]." Before the statute was promulgated, and while the Parliament which passed it was still sitting, William Sawtre was pronounced by Arundel, Archbishop of Canterbury, in the provincial council, a relapsed heretic, degraded and committed to the secular court. A writ was accordingly issued by the King in Parliament ordering the heretic to be burned[2], and the sentence was

The Act declaring 5 Rich. II, stat. 2, cap. 5 void was omitted (it is said through the craft of the clergy) from the published editions of the statutes; therefore in the days of the Reformation 5 Rich. II, stat. 2. cap. 5 was treated as still subsisting, but it could hardly have been acted upon until the action of the House of Commons had been forgotten. It was finally repealed by the Statute Law Revision Act, 1863.

[1] 2 Henry IV, c. 15. *Statutes of the Realm*, II, p. 125.

[2] A copy of the writ is to be found in *Rot. Parl.* III, 459.

carried out. The writ is dated February 26, though the Parliament which passed the statute *de Haeretico* did not break up until March 10, and this fact is the main basis of the argument that after the statute *de Haeretico* had been formally repealed, heretics might still be committed to the flames because the writ *de Haeretico comburendo* could issue at common law independently of the statute. Fourteen years later it was thought right to still further increase the severity of the law. 2 Hen. V, stat. 1, cap. 7 provides that the chancellor, justices, and magistrates shall make an oath to use all diligence in destroying all manner of heresies and errors, commonly called Lollardries, and that all persons convict of heresy and left to the secular power according to the laws of holy church shall forfeit their lands and tenements as in the case of attainder for felony, and that their goods and chattels shall also be forfeited to the King. These acts remained in full force till the year 1533, and were frequently resorted to. They placed almost unlimited power in the hands of the Church. There was no definition of heresy, and the bishops were thus empowered to punish any views which were at variance with their own. The procedure was also most drastic; a person once pronounced to be an obstinate or relapsed heretic was handed over to the civil power, which had no alternative but to execute the utmost rigour of the law. We can thus explain the total absence of any effort to establish a Jewish colony in England after the banishment from Spain in 1492. The knowledge of the severity of the English law combined with the memory of the cruelties that accompanied the expulsion two hundred years before would effectually discountenance any such attempt.

Under Henry VIII and Edward VI the law as to heresy was considerably altered, but it was not varied in such a way as to give any sort of toleration to those who held principles in conflict with the doctrines proclaimed by the sovereign as supreme head of the Church as binding on all its members. Many heretics were put to death in the

reign of Henry VIII, and in the short reign of Edward VI at least two persons were burned for heresy[1]. Mary, shortly after her accession, procured the passing of an "Acte for the renueing of three Estatutes made for the punishment of Heresies," providing that the three statutes enacted in the reigns of Richard II, Henry IV, and Henry V, already mentioned, should "from the xxth day of Januarye next coming be revived and be in full force strengthe and effecte to all Intentes construcions and purposes for ever[2]." The fierce and merciless persecution that ensued has caused a horrible but not undeserved epithet to be added to the name of the first Queen regnant of England, and though the number of the victims may have been exaggerated in after years, hundreds were brought to the stake within the short period of less than four years that elapsed before the Queen's death[3]. When Elizabeth came to the throne, the law was again recast. The first Act of Parliament passed in her reign, commonly called the Act of Supremacy (1 Eliz. cap. 1, sect. 15) expressly repealed the Act of Philip and Mary under which the persecutions had taken place, as also the former statutes for the punishment of heresies revived by that Act; but it was by no means intended to allow heresy and error to go unpunished, and therefore by sect. 17 jurisdiction for the visitation "of all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities" was annexed to the crown, and by the following section the Queen was empowered to appoint commissioners to exercise her ecclesiastical jurisdiction, and to visit, reform, and correct

[1] The principal statutes are 25 Hen. VIII, cap. 14, and 31 Hen. VIII, cap. 14 (the Act of the Six Articles), 1 Edw. VI, cap. 12, 1 Edw. VI, cap. 1, and 2 & 3 Edw. VI, cap. 1 (see sect. 3). The last two, though obsolete, are still technically in force. For the whole subject see Stephen's *History of Criminal Law*, vol. II, pp. 453-460.

[2] 1 & 2 Phil. and Mary, cap. 6.

[3] The exact number is given as 277. For the persecution see Dodd's *Church History*, vol. II, pp. 101-109; Pike's *History of Crime*, vol. II, pp. 57-60, and 613.

all errors, heresies, &c., " to the pleasure of Almighty God, the increase of virtue, and the conservation of the peace and unity of this realm " ; but a later section (sect. 36) limited the power of the commissioners so appointed, by declaring that nothing should be adjudged heresy unless determined to be heresy by the authority of the canonical scriptures, or by certain general councils, or by the high court of Parliament, with the assent of the clergy in their convocation. This restriction was no doubt intended, and did in fact operate, to exempt Roman Catholics from prosecution for heresy—Papists obnoxious to the government were proceeded against for other crimes—but it could not in any way relieve or exempt Jews, or any one who impugned the sacred doctrine of the Trinity. Although the procedure established by the statutes passed under the Lancastrian kings was abolished, it seems to have been assumed that a culprit in the case of contumacy could be burned, and that the writ *de Haeretico comburendo* would issue at common law. There are several instances of this having taken place. Two Anabaptists were burned in the year 1575, and two Arians as late as 1612. One of these last, Bartholomew Legatt, was charged with holding thirteen damnable tenets, most or all of which are held by every believing Jew ; the last two are short and are here inserted from the collection of state trials : " 12. That Christ by his Godhead wrought no miracle. 13. That Christ is not to be prayed unto[1]." There has been considerable discussion among lawyers as to the legality of the punishment in these latter cases ; into this discussion it is not our purpose to enter ; it is enough to state the fact that the convictions took place and that the extreme penalty was enforced, to show what might have been the position of professing Jews openly living and practising their religion in this country.

Since the year 1612 no execution for heresy has taken place in England, nor were offenders, if it was intended to

[1] 2 *State Trials*, p. 729.

deal severely with them, brought before the ecclesiastical courts. They were, however, dealt with by the Court of High Commission, which had been constituted in its ultimate form in the year 1583 under the powers supposed to be conferred on the crown by the eighteenth section of the Act of Supremacy, the substance of which has already been given. The commissioners had no power to order capital punishment, but they were authorized to award "such punishment by fine, imprisonment, censure of the church or otherwise, or by all or any of the said ways, and to take such order for the redress of the same, as by their wisdom and discretions should be thought meet and convenient"; and these penalties were unsparingly inflicted. Their mode of procedure was most arbitrary, and by contemporaries not inaptly compared to that of the Inquisition. There was as a rule no jury, though the court could if it wished summon a jury; arrests were made without any legal warrant; the accused were punished, though there was no evidence against them, except such as was wrung out of their own mouths by means of the *ex officio* oath. "In two points alone it was distinguished from the Inquisition of Southern Europe. It was incompetent to inflict the punishment of death, and it was not permitted to extract confessions by means of physical torture." Such a court could be made a terrible engine of oppression by a zealous persecutor, for it assumed authority not merely to try but to seek out offenders; for example, on April 1, 1634, when Laud had held the primacy but a few months, a circular letter was sent by the commissioners to all officers of the peace in the kingdom, of the following tenor: "There remain in divers parts of the kingdom sundry sort of separatists, moralists, and sectaries, as namely—Brownists, Anabaptists, Arians, Traskites, Familists, and some other sorts, who, upon Sundays and other festival days, under pretence of repetition of sermons, ordinarily use to meet together in great numbers in private houses and other obscure places, and there keep

private conventicles and exercises of religion by law prohibited, to the corrupting of sundry his Majesty's good subjects, manifest contempt of his Highness's laws and disturbance of the Church. For reformation whereof the persons addressed are to enter any house where they shall have intelligence that such conventicles are held, and in every room thereof search for persons assembled and for all unlicensed books, and bring all such persons and books found before the Ecclesiastical Commission as shall be thought meet[1]." The circular makes no mention of Jews; had Laud and his associates known that they were at this very time beginning to creep secretly into the kingdom, this omission would hardly have been made.

The court had always been unpopular, and the oppressive use made of it by Laud caused its abolition by the Long Parliament in 1640 by a statute (16 Car. I, cap. 11). After reciting, "Whereas by colour of some words . . . in the Act (of Supremacy) . . . commissioners have to the great and insufferable wrong and oppression of the King's subjects, used to fine and imprison them, and to exercise other authority not belonging to ecclesiastical jurisdiction... and divers other great mischiefs and inconveniences have also ensued to the King's subjects," section 18 of the Act of Supremacy, under which the letters patent constituting the High Commission were issued, was repealed. A further section dealt with the other ecclesiastical courts, depriving them of all power to inflict "any pain, penalty, fine, amercement, imprisonment, or other corporal punishment upon any of the King's subjects," or to administer the *ex officio* oath. Thus after 1640, though heresy was not removed from the list of crimes, there was no court which could inflict any higher punishment than a purely ecclesiastical penalty. After the Restoration all the provisions of this statute, excepting those abolishing the Court of High Commission and the *ex officio* oath, were repealed (13 Car. II, stat. 1, cap. 12), and the power of inflicting physical punishment

[1] *Cal. S. P. Domestic*, 1633-4, p. 538.

was thus restored to the ecclesiastical courts, but some years afterwards, in 1679, it was further abridged by 29 Car. II, cap. 9, which abolished the writ *de Haeretico comburendo*, and all punishment by death in pursuance of ecclesiastical censures," reserving to the ecclesiastical courts only the power to punish atheism, blasphemy, heresy, &c., "by excommunication, deprivation, degradation, and other ecclesiastical censures not extending to death." This is still the law, but there is no record of any prosecution for heresy ever having taken place since the ecclesiastical courts were shorn of their power of inflicting corporal punishment by the Long Parliament in 1640.

Such was in outline the law of heresy; it remains now to consider the second impediment to a Jewish resettlement, the Law of Uniformity. The expression Church and State is a common, almost a hackneyed one, and we are apt to forget that there was once a time when no one, who was not an adherent of the Church, could be a citizen of the State; and when severe pains and penalties were incurred by non-attendance at church or by attendance at any religious meeting not sanctioned by the ecclesiastical authorities. Prior to the Reformation the Church had been content with punishing under the name of heretics those who ventured to proclaim doctrines inconsistent with her creed; the zeal engendered by the movement for reform prompted the punishment, though with somewhat milder penalties, of those who neglected or refused to take part in public worship as by law established. The first statutory provision was a very mild one. The Act of Uniformity (1 Eliz. cap. 2) after enacting that the Book of Common Prayer should be used in all churches and ordaining penalties for those who depraved it, provides (sect. 14) that "all and every person inhabiting within this realm, or any other the Queen's Majesty's dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof,

to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday, and other days ordained and used to be kept as holy days, and then and there to abide orderly and soberly during the time of the common prayer, preaching, or other service of God there to be used and ministered," upon pain of punishment by the censures of the Church and of forfeiting for every offence twelve pence to the use of the poor of the parish. The penalty was only small, but sufficient to cause all except the very wealthy to conform, especially as the law was strictly interpreted. Serjeant Hawkins[1] says of it: "he who misbehaves himself in the church, or misses either morning or evening prayer, or goes away before the whole service is over, is as much within the statute as he who is wholly absent; and he who is absent from his own parish church shall be put to prove where he went to church." It was, however, thought too lenient and was supplemented by an Act to retain the Queen's Majesty's subjects in their due obedience (23 Eliz. cap. 1), sect. 5 of which ordains that every person above the age of sixteen years who does not attend church shall forfeit to the Queen's Majesty twenty pounds for every month's absence. This penalty was in addition to the forfeiture of twelve pence imposed by the Act of Uniformity, and a month was interpreted as a lunar month, so that thirteen penalties might be imposed every year. If the penalty was not paid, the offender was liable under a later statute (29 Eliz. cap. 6, sect. 4) to have all his goods and two-thirds of his lands seized to the use of the crown; one-third of his lands (if he was fortunate enough to be a landowner or a leaseholder) being left him for the maintenance and relief of his family. But even this was not enough. Twelve years later a still more stringent Act (35 Eliz. cap. 1) bearing the same title was passed. Any one who obstinately refused to come to church without any lawful cause, and in addition (1) persuaded any other person to

[1] *Pleas of the Crown*, Bk. I, cap. 10, sect. 4.

abstain from going to church or receiving the communion administered according to the rites of the Church, or to be present at any unlawful assemblies, conventicles, or meetings, or (2) "either of himself or by the persuasion of any other" willingly joined in or was present at any such assemblies, conventicles, or meetings under colour or pretence of any exercise of religion contrary to that prescribed by the Act of Uniformity, was to be committed to prison until he should conform and make open submission and declaration of his conformity. If he did not conform within three months he was to abjure the realm of England and all the Queen's dominions for ever. If he refused to abjure or after abjuration did not depart out of the realm, he was to be adjudged a felon and suffer as in the case of felony (i. e. death and forfeiture of lands, goods, and chattels), without benefit of clergy.

Persons neglecting to come to church were called Recusants; and if they absented themselves because they were Papists, Popish Recusants. This latter class was subject to still further disabilities. In Elizabeth's reign they were not allowed to remove more than five miles from home without licence (35 Eliz. cap. 2). The alarm which succeeded the discovery of Gunpowder Plot—an event making so great an impression on the popular mind that its anniversary is still celebrated with more public enthusiasm than any other event in our history, not excepting the destruction of the Spanish Armada or the battle of Waterloo—caused the enactment of still more stringent measures. These were the Act for the better discovering and repressing of popish recusants (3 Jac. I, cap. 4) and the Act to prevent and avoid dangers which grow by popish recusants (3 Jac. I, cap. 5). As many of the provisions of these Acts might not have applied to Jews, it is unnecessary to enter into them here. One provision, however, which was undoubtedly not confined to Papists, cannot be passed over. By sect. 13 of the former Act "for the better trial how his Majesty's subjects stand affected in point of their loyalty

and due obedience," all persons over the age of eighteen who had been convicted or even merely indicted of any recusancy for not attending divine service, or who had not received the sacrament twice within the year might be compelled to take an oath, afterwards known as the oath of allegiance, the terms of which are set out in sect. 15. They are framed with the intention of being obnoxious to Papists, and expressly renounce and deny any authority to the Pope, so that many Roman Catholics who were ready to take the oath prescribed by the Act of Supremacy (1 Eliz. cap. 1, sect. 19) found themselves unable to take the new oath, the last clause of which must have been unacceptable to a religious Jew. It reads as follows: "And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words without any equivocation or mental evasion, or secret reservation whatsoever: and I do make this recognition and acknowledgment heartily, willingly, and truly, *upon the true faith of a Christian*, So help me God." The oath itself was abolished in 1688 by the Bill of Rights (1 W. & M., sess. 2, cap. 1, sect. 3); but the final words, now for the first time introduced, were retained in other forms of oaths and declarations and, as will be hereafter shown, for a long time proved an insurmountable obstacle to the Jews in their struggle for the acquisition of political rights[1]. The Acts contain other sections also which were not confined to Popish recusants; e. g., sects. 8 and 11 of the former enable the crown to refuse the penalty of twenty pounds a month for not attending church imposed by the statute of Elizabeth, and to seize and retain two-thirds of all the lands belonging to the offender, even although no default had been made in the payment of the penalty or the amount had been

[1] Four years afterwards provision was made for more effectually administering this oath to persons neither indicted nor convicted of recusancy. See 7 Jac. I, cap. 6.

actually tendered. And by sects. 3 to 5 of the latter all persons with certain exceptions, who had not repaired to church for the space of three months, were ordered to depart from the city of London and ten miles compass of the same; and by sect. 8 of the same Act convicted recusants were disabled from holding legal, military, or naval offices, and from practising the professions of the law and medicine. Moreover, to prevent evasion of these penalties and disabilities by merely formal attendance at church, it was enacted that a recusant who conformed and repaired to church should also be required to take the sacrament of the Lord's Supper once at least every year.

Such was the legislation against recusants, which was not finally repealed until the middle of the last century [1]. We are now able to sum up the legal position in which Jews, in the early years of Charles I's reign, when they undoubtedly began to settle here, would find themselves. There was no law to prevent their coming here. If the banishment in 1290 had been effected by royal proclamation, the force of that proclamation had long been spent; if on the other hand it had been by Act of Parliament, as many persons at that time believed, the Act itself had long been lost, and any Jew for whose expulsion legal process might be brought could challenge his adversary to produce the Act. If this initial difficulty had been got over and the court had been induced by reasoning similar to Prynne's that there must have been such an Act of Parliament and that it was lost, then it would remain to consider what effect that would have upon Jews coming to England in the reign of King Charles. The first precedent cited by Prynne is the Act banishing the Despensers, and it would have been necessary to assume, as Prynne does, that the Act banishing the Jews was in similar terms. The enacting words of that statute are as follows:

[1] 7 & 8 Vict. cap. 102 repealed most of the penal enactments so far as Roman Catholics were concerned; 9 & 10 Vict. cap. 59 repealed the remaining penal enactments, including those against Jews.

"Wherefore we Peers of the Land . . . do award that Sir Hugh le Despenser the Son and Sir Hugh le Despenser the Father, be disherited for ever . . . and that they be utterly exiled out of the land of England, without returning at any time, unless it be by the Assent of our Lord the King and by the Assent of the Prelates, Earls and Barons, and that in Parliament duly summoned . . . and if they do return, then be it done unto them, as enemies of the King and of the Kingdom[1]." Substitute the words "Jews in England" for the words "Sir Hugh le Despenser the Son and Sir Hugh le Despenser the Father" and it is seen at once that the Act would apply only to the persons actually banished, for there are no words to include heirs, issue, or children; but even if such words were embodied in the Act, it would have been quite impossible to prove that a Spanish Jew living in the seventeenth century was an heir, descendant, or in any wise connected with the English Jews, all of them of German origin, of the thirteenth century. The residence of Jews in England was therefore lawful, but they would of course be subject to all the laws which bound aliens living here; though they would not be liable to the disabilities imposed on the Judaei by the legislation of Henry III and Edward I, because the special status of serfdom or villenage to which those disabilities had been attached, though not legally abolished, had practically become obsolete. On the other hand, if they attempted to practise their religion they were liable to be charged with heresy in the ecclesiastical courts or to be summoned and persecuted by the Court of High Commission; in any case the common law would compel them to regularly take part in the services of a church, which they believed to be idolatrous. If they neglected to attend they were subject to severe penalties, and if in addition they took part in a Jewish service they could be made to abjure the realm, and should they still remain here they were guilty of felony and denied all benefit of clergy. Thus the

[1] *Statutes of the Realm*, vol. I, p. 184.

real impediments to a Jewish settlement were the impossibility of setting up a Jewish synagogue and the necessity of taking part in the religion of the established church. The first of these obstacles was not removed until the reign of Charles II; we will now explain how the second was obviated in the time of that king's father.

Before the commencement of the seventeenth century, it had become customary for the monarchs of Europe to maintain legations in each other's capitals, and these legations were, by the principles of international law, which were even at this time beginning to be recognized, regarded as exterritorial—i.e. as not subject to the ordinary law of the land. Accordingly the law of heresy and the statutes against recusants would not apply to persons attached to any foreign embassy, but they would apply to all other foreigners coming to this country. Therefore on the marriage of Charles I with Henrietta Maria elaborate provision was made by treaty for the religion of the queen and her suite. However, in the treaty made with Spain in the year 1630 a clause was inserted which was interpreted as entitling all Spanish subjects, though not belonging to the embassy, to exemption from the penal laws against recusants. In express words the King of Spain undertook that subjects of the King of England who might be in his dominions for the purposes of commerce should not suffer any molestation or disturbance on account of their religion, provided that they gave no occasion for scandal. No similar promise was made by the King of England in respect of Spanish merchants, but the reason for this was that there were very few likely to remain here for more than one month and so render themselves liable to the laws against recusants, and it was well understood that the promise was reciprocal and that it would not be fulfilled unless a like measure of toleration was extended to Spanish subjects in England[1]. It was

[1] The treaty is printed in Rymer's *Foedera*. The words of clause 19 are: "Et quia iura commercii quae ex pace consequuntur infructuosa reddi

shortly after the signature of this treaty that a few Jews ventured to permanently settle in England, but they came not as Jews but as Spaniards, and sheltering themselves under the protection of the treaty were able to avoid taking part in the services of the English church. They were crypto-Jews and thought by all their neighbours to be Catholics, and no doubt occasionally attended mass at the ambassador's chapel, in order to ingratiate themselves with the embassy. Some had fled from Spain through fear of the Inquisition, but there is no evidence of any kind that they ever attempted to practise the Jewish religion here, and as it was necessary to keep on friendly terms with the representative of the Catholic king they were not likely to do anything to forfeit his protection. Among the earliest of these new comers was Antonio Fernandez Carvajal; he must have arrived here in or before the year 1635, long before the Great Rebellion commenced, for in the letters of denization which were granted to him by Cromwell on Aug. 17, 1655, he is described as having "for the space of twentie yeares and upwards been an Inhabitant in this nation." When he had been here for some years he with other merchant strangers was prosecuted as a recusant, but the English merchants who had factors in Spain petitioned the House of Lords to stay the proceedings on the ground that the result of a convic-

non debent, prout redderentur si subditis Serenissimi Regis Angliae dum eunt et redeunt ad Regna et Dominia dicti Serenissimi Regis Hispaniarum, et ibi ex causa commercii, vel negotii moram trahunt, eis molestia inferatur ex causa conscientiae, Ideo ut commercium sit tutum et securum tam in terra quam in mari, dictus Serenissimus Rex Hispaniarum curabit et providebit, ne ex praedicta causa conscientiae contra iura commercii molestentur et inquietentur, ubi scandalum alii non dederint." *Foedera*, vol. VIII, pt. 3, p. 143 (edition of 1742). In the treaty of 1667, which was renewed by the treaty of Versailles in 1783, the same clause occurs, but the reciprocal clause is expressed, "and the said King of Great Britain shall likewise provide, for the same reasons, that the subjects of the King of Spain shall not be molested or disturbed for their conscience against the laws of commerce, so long as they give no public scandal or offence." Hertslet's *Collection of Treaties*, vol. II, p. 152.

tion would be that their own factors would be similarly treated in Spain and thereby be compelled either to forsake their religion or abandon the country, which would be a matter of great concernment, as there were above one hundred English subjects resident in Spain for every Spaniard resident here. The petition appears to have been granted and the proceedings stayed [1]. Whether the other merchants attacked at the same time as Carvajal were also Jews we do not know, but we do know from the depositions in the Robles' case that there were at this time several other Jews in London who were or professed to be Spaniards and therefore obtained immunity from the penalties imposed upon recusants. It is important not to exaggerate this indulgence; it did not extend to the toleration of any sort of Jewish worship and it was itself withdrawn by the outbreak of the war with Spain in 1656.

This position could not have been satisfactory to the Jewish communities abroad. If they knew of the existence of and held communication with the crypto-Jews here, they must have seen that the situation of their brethren in England was little if at all better than that of the Marranos in Spain; they were bound to take part week by week in the idolatrous worship of the Protestant church or else to obtain the protection of the Spanish embassy, as the price of which they would have to be occasionally present at the no less objectionable Catholic mass, and furthermore to completely disguise their Jewish faith even to the extent of refraining from entering into the covenant of Abraham. In neither case could they meet for worship according to Jewish rites. The establishment of a synagogue or the organization of a community was impossible, and even private prayers could only be indulged in under the cover of the strictest secrecy.

[1] For the petition see *Lords' Journals*, vol. VII, p. 141. It was presented Jan. 16, 164⅘. For Carvajal see "The First English Jew," by Lucien Wolf, *Trans. Jewish Hist. Soc.*, vol. II, pp. 14-46.

At length a brighter prospect seemed to open out; the Great Rebellion had broken out and proved successful, and the Protestant Dissenters who had formerly inveighed against the persecution of the church and advocated universal toleration were invested with the powers of government. And yet in the moment of their triumph they forgot or repudiated the precepts and maxims which had been so dear to them in the hour of persecution. True it is that the law against heresy was practically repealed by the abolition of the Court of High Commission and the power of temporal punishment formerly exercised by the ecclesiastical courts, but the Parliament claimed the right to itself take cognizance of offences against religion, and in the assertion of this claim, which was not abandoned until the Restoration, inflicted penalties even more severe than those formerly imposed by the Court of High Commission[1]. It was only with exceptional cases that it could itself deal, and accordingly in May, 1648, it made an Ordinance for punishing Blasphemies and Heresies. The ordinance enumerates eight distinct heresies or errors (including, for example, maintaining that Jesus Christ is not the Son of God and that the New Testament is not the word of God), and provides that persons found guilty of any of them, unless they recant and abjure their errors, shall suffer the pains of death as in case of felony, without benefit of clergy; if they recant they are to be imprisoned until they find sureties against a repetition of the offence, but if they repeat the offence after having recanted they are to suffer death as in case of felony without benefit of clergy. The ordinance also enumerates other errors, which are to be visited with less severe penalties[2]. The laws against recusants were not interfered with, but the church services at which attendance was compulsory were to be

[1] See the case of Paul Best, who had asserted that Christ was merely and properly a man (Goodwin, II, pp. 252 seq.), and James Nayler (5 *State Trials*, 801).

[2] Scobell, part 1, p. 149.

conducted in accordance with the new Service-book, called the Directory, which had recently been framed by the Westminster Divines; and two ordinances were passed, one in March, 1645, providing that "the Book of Common Prayer shall not be henceforth used, but the Directory for Publique Worship," and the other on the 23rd of August of the same year ordering "the Directorie to be put in execution with penalties for using the book of Common Prayer[1]." The penalties were five pounds for the first offence, ten pounds for the second offence, and for the third offence "one whole year's imprisonment without bail or mainprize." These ordinances gave great satisfaction to the Presbyterians who possessed a majority in the Long Parliament, and who, having destroyed the power of the church were eager to establish their own form of worship and invest themselves with all the powers of the church they had supplanted, including the right to persecute all who held religious opinions different from their own. But this the Independents, who besides having a strong minority in the House, had the preponderating voice in the council of the army, which in those troublous times really governed the land, were bound to dispute. After a prolonged struggle the Independents gained the upper hand, and on December 6, 1648, succeeded with the help of the army in excluding their Presbyterian opponents from all share in the deliberations of the Parliament and the government of the nation. Again the party which had stood for toleration was successful, and the Jews who had long cast anxious eyes upon the growing commerce of England and desired to share it, were not slow to take advantage of so favourable an opportunity. The Council of Mechanics at Whitehall had at the end of December voted a toleration of all religions whatsoever, "not excepting Turkes nor Papists nor Jews[2]." A petition on their behalf was prepared by the Jews of Amsterdam; it was in the name of Johanna

[1] Scobell, part 2, pp. 75 and 97.

[2] Pragmaticus, Dec. 19–26. The Council of War had also on Christmas

Cartwright a widow, and Ebenezer her son, freeborn of England, and resident in the city of Amsterdam, and prayed that the Statute of Banishment made against the Jews might be repealed and that they under the Christian banner of charity and brotherly love, might "be again received and permitted to trade and dwell in this Land as now they do in the Netherlands." The petition was presented to the General Council of the Officers of the Army, under the command of Lord Fairfax, at Whitehall on January 5, $164\frac{8}{9}$, and favourably received with a promise to take it into speedy consideration "when the present more public affairs" were dispatched [1]. The present more public affairs were the trial and execution of the king and the settlement of the government, and proved to be of such momentous concern that the petition of the Jews was completely overlooked; at least nothing was done upon it nor was the law altered or relaxed in their favour. And yet a belief was spread abroad that the petition had been granted. A circular was published by the disappointed and defeated Presbyterians entitled "the last damnable Designe of Cromwell and Ireton and their Junto or Caball," in which it is stated that "their real designe is to plunder and disarme the City of London and all the country round about . . . and so sell it (the plunder) in bulk to the Jews, whom they have lately admitted to set up their banks and magazines of Trade amongst us contrary to an Act of Parliament for their banishment [2]." Nor was this belief confined to the political opponents of the dominant faction

Day voted "a Toleration of all religions." *History of the Independency*, part 2, p. 50.

[1] The petition was printed and there is a copy of it in the British Museum, King's Pamphlets, E 557, Art. 17, and is reprinted in Hag., *Cons. Cases*, vol. I, Ap. No. 1. For the whole transaction see the *Clarke Papers*, vol. II, p. 172; *History of the Independency*, part 2, pp. 60 and 83; and "A Perfect Diurnall of some passages in Parliament and the daily proceedings of the Army under His Excellency the Lord Fairfax, from Munday the 1 of Janu. till Munday the 8 of Janu. 1648."

[2] *History of the Independency* [4to, 1649], at p. 61.

here, for in the collection of original letters found among the Duke of Ormonde's papers is to be found the following:—

"Rouen, March $\frac{17}{27}$, $164\frac{8}{9}$.

"This morning I happened to have some discourse with a Jew that spake English, and asking him how he liked the Parliament and Army of England, now they had revoked the Laws that were made against the Jews; he told me, that nevertheless he thought that there were no such villains in the world as they are, and believed that none of his Religion would ever adventure themselves among such bloody traitors as had murdered their own King[1]."

But yet no one at the present time would seriously argue that the readmission of the Jews into England dates from January, 1649, nor should we give more weight to similar expressions which seem to indicate a successful issue to the negotiations conducted by Menasseh Ben Israel some six or seven years later, which in the end proved equally abortive. The ascendency of the Independents lasted till the death of Cromwell in 1658, but during the whole of it, the law was in no way altered to the advantage of the Jews. True, a milder ordinance was passed for the punishment of atheistical, blasphemous and execrable opinions; as for instance maintaining that there is neither heaven nor hell, neither salvation nor damnation, the penalty being six months imprisonment for the first offence and banishment for the second, and if any one returned after being banished he was to suffer as in case of felony without benefit of clergy[2]. This ordinance, cruel as it is, is milder than the one passed by the Presbyterians in May, 1648, for the extreme penalty could only be inflicted in the case of a second offence, but the earlier ordinance was not repealed, and as the offences enumerated by the two enactments were different, both were technically in force at

[1] Ormonde's *Letters*, vol. I, p. 233.

[2] See the ordinance of Aug., 1650, cap. 22, given in Scobell, II, p. 124.

the same time. The advocates of toleration throughout the period of their power showed no disposition to abandon the weapons of persecution:

Et qui nolunt occidere quenquam
Posse volunt.

It may be said on their behalf that the earlier and more cruel ordinance was never put into execution by them, but on the other hand there is no record of its having been enforced by the Presbyterians either, and the later ordinance was undoubtedly acted upon; the proceedings against George Fox, the Quaker, being a well-known instance[1].

Though the Independents did not repeal the law relating to blasphemy, they found it necessary to materially amend the laws against recusants. In spite of having obtained the supreme power, they formed, if numbers only were counted, a small if not insignificant minority of the general population. They had as strong objections to the new Directory as to the old Book of Common Prayer, nor could they hope to establish any form of worship which should be both consonant to their own religious ideas and acquiesced in by the other rival sects. Accordingly, shortly after the victory of Dunbar the Parliament passed an Act for the repeal of several clauses in Statutes imposing penalties for not coming to church. It recites that "divers religious and peaceable people, well-affected to the prosperity of the Commonwealth, have not only been molested and imprisoned, but also brought into danger of abjuring their country, or in case of return to suffer death as felons, to the great disquiet and utter ruin of such good and godly people, and to the detriment of the Commonwealth," and repeals all clauses of the Act of Uniformity (1 Eliz. cap. 2), and the Acts for retaining the Queen's subjects in their due obedience (35 Eliz. cap. 1, and 23 Eliz. cap. 1), and all clauses in any other Act whereby any penalty is imposed on any person whatsoever, for not repairing to their

[1] Goodwin, vol. IV, p. 309.

respective parish churches. But the exemption from penalties was subject to this proviso, that "to the end that no profane or licentious persons may take occasion . . . to neglect the performance of religious duties . . . all and every person and persons within this Commonwealth . . . shall (having no reasonable excuse for their absence) upon every Lord's day . . . diligently resort to some public place where the service and worship of God is exercised, or shall be present at some other place in the practice of some religious duty, either of prayer, preaching, reading, or expounding the scriptures or conferring upon the same[1]." Every person not so attending was to be deemed to be an offender against the law and proceeded against accordingly. This proviso would prevent any real measure of relief to the Jews, for attendance at a synagogue, if there had been one in existence, would assuredly not have been held to be a compliance with the Act. Should there be any doubt upon this point, it is cleared away by the religious clauses of the Instrument of Government; the document under which Oliver claimed to exercise his power as Lord Protector. The terms of the Instrument were finally settled before December 16, 1653, on which date it came into force. The clauses relating to religion are Articles 35, 36, and 37, and provide that the Christian religion shall be publicly professed, but that to this public profession none shall be compelled by penalties or otherwise, and all who professed faith in God by Jesus Christ (though differing from the doctrine publicly held forth) should be protected in the profession and exercise of their religion "so as they abuse not this liberty to the civil injury of others and to the actual disturbance of the public peace on their parts, provided this liberty be not extended to Popery or Prelacy, nor to such as under the profession of Christ, hold forth and practise licentiousness[2]."

If one thing is certain among the doubts occasioned by

[1] Ordinance of Sept. 27, 1650; Scobell, II, p. 131.

[2] Gardiner's *Constitutional Documents*, p. 324.

the hasty and manifold changes of law which took place during this revolutionary period, it is that freedom of worship was not extended even to all Christian sects; indeed, the majority, as events afterwards proved, were expressly excluded from protection by the last recited article, and no form of worship not in accordance with Christian dogma was at any time legal or authorized throughout the whole period.

Nevertheless, the Jews, encouraged by the reception their overtures had met with in the early part of 1649, had not given up their hopes. The Navigation Act which became law on October 9, 1651 [1], caused such friction between England and the Dutch against whose carrying trade it was principally directed, that war between the two nations became almost inevitable, and actually broke out. While the war lasted the negotiations which had been carried on from Amsterdam were naturally suspended. In the month of April, 1654, peace was again proclaimed, and the negotiations were almost immediately resumed. Manuel Martinez Dormido, a member of the well-known family of the Abarbanels, arrived in London early in September, and presented to the Protector two petitions for the readmission of the Jews. These were in due course recommended to the speedy consideration of the Council, but they met with the reception which throughout the interregnum was accorded to all attempts to relax the law in favour of the Jews; the Council did not see its way to make any order in the matter [2]. But the cause was not yet hopeless; in the October of the year following, Menasseh ben Israel, brother-in-law to Dormido, and a learned Rabbi, came from Amsterdam to London, and was hospitably received by the Protector; who was willing to admit the Jews and even tolerate their worship, if conducted privately and without

[1] Scobell, II, p. 176.

[2] See *Cal. State Papers*, 1654, pp. 393 and 407; Goodwin, IV, p. 47, note; *Trans. Jewish Hist. Soc.*, vol. III, where the text of the petitions is given at pp. 88–93.

scandal, but who was at the same time determined not to risk a popular tumult which might not improbably break out if protection was extended to a strange religion without the previous sanction and approbation of the leaders of the people. It was with this view that a conference was summoned to meet at Whitehall to discuss the question. So much has recently been written about the conference and the events which led to it, that it will be sufficient here to extract from the old Parliamentary History the Narrative published by order of Cromwell and his Council[1].

"Whitehall, December 4.

"Divers eminent Ministers of the Nation, having been called hither by Letter from the Lord Protector, were present with his Highness and the Council in the Council-Chamber; when the following Proposals, made by certain Jews, of whom Rabbi Menasseh Ben Israel, of Amsterdam, was the Chief, were read to them.

"'These are the Graces and Favours which, in the Name of my Hebrew Nation, I Menasseh Ben Israel do request of your Most Serene Highness, whom God make prosperous, and give happy Success to, in all your Enterprises, as your humble Servant doth wish and desire.

"'1. The first Thing I desire of your Highness is, That our Hebrew Nation may be received and admitted into this puissant Commonwealth, under the Protection and Safeguard of your Highness even as the Natives themselves. And, for greater Security in Time to come, I do supplicate your Highness to cause an Oath to be given (if you shall think it fit) to all the Heads and Generals of Arms to defend us upon all Occasions.

"'2. That it will please your Highness to allow us public Synagogues, not only in England, but also in all other Places under the Power of your Highness; and to observe in all Things our Religion, as we ought.

[1] Printed by Henry Hills, printer to His Highness the Lord Protector. *Parl. Hist.*, vol. XX, p. 474.

"'3. That we may have a Place or Coemitery, out of the Town, to bury our Dead, without being troubled by any.

"'4. That we may be permitted to traffic freely in all Sorts of Merchandise, as others.

"'5. That (to the end those who shall come may be for the utility of the People of this Nation, and may live without bringing Prejudice to any, and not give Offence) your Most Serene Highness will make Choice of a Person of Quality, to inform himself of and receive the Passports of those who shall come in; who, upon their Arrival, shall certify him thereof, and oblige themselves, by Oath, to maintain Fealty to your Highness in this Land.

"'6. And (to the Intent they may not be troublesome to the Judges of the Land, touching the Contests and Differences that may arise betwixt those of our Nation) that your Most Serene Highness will give License to the Head of the Synagogue, to take with him two Almoners of his Nation to accord and determine all the Differences and Process, conformable to the Mosaic Law; with Liberty, nevertheless, to appeal from their Sentence to the Civil Judges; the Sum wherein the Parties shall be condemned being first deposited.

"'7. That in case there have been any Laws against our Jewish Nation, they may, in the first Place and before all Things, be revoked; to the end that, by this Means, we may remain with the greater Security under the Safeguard and Protection of your Most Serene Highness.

"'Which things your Most Serene Highness granting to us, we shall always remain most affectionately obliged to pray to God for the Prosperity of your Highness, and of your illustrious and sage Council, that it will please him to give happy Success to all the undertakings of your Most Serene Highness. Amen.'

"The Ministers having heard these Proposals read, desired Time to consider of them, and the next Day was spent in Prayer and Fasting.

"*Dec.* 7. This Day, in the Afternoon, a Conference was held with the Ministers about these Proposals, in the Presence of his Highness the Lord Protector, the Lord President Lawrence, Lord Lambert, Lord Fiennes, and divers more of the Council, with the Lord Chief Justice Glynn, and the Lord Chief Baron Steel. Of the Ministers there were Dr. Thomas Goodwin, Dr. Wilkinson, Dr. Tuckney, Mr. Manton, Mr. Nye, Mr. Bridge, and many others; but nothing being concluded on, another Conference was appointed to be held on the next Wednesday. Accordingly,

"*Dec.* 12. The Conference was renewed in a Withdrawing Room in the Presence of the Lord Protector, where a Committee of the Council were met by the greatest Part of the Ministers and other Persons, approved by his Highness to take the said Proposals into Consideration; but nothing then resolved upon.

"*Dec.* 14. There was another Conference on the same Subject. And,

"*Dec.* 18. The Committee broke up without coming to any Resolution or even a further Adjournment.'

"The Narrative concludes with this Remark, 'That his Highness, at these several Meetings, fully heard the Opinions of the Ministers touching the said Proposals; expressing himself thereupon with Indifference and Moderation, as one that desired only to obtain Satisfaction in a Matter of so high and religious a Concernment; there being many glorious Promises recorded in Holy Scripture, concerning the Calling and Convention of the Jews to the Faith of Christ. But the Reason why nothing was concluded upon was, because his Highness proceeded in this, as in all other Affairs, with good Advice and mature Deliberation.'"

Thus the famous Conference resulted, like all the attempts made during the interregnum, in nothing being done and no alteration in the law being made; Cromwell's

good-will was not proof against the prejudice which was displayed at the Conference and which was rampant among the mob outside. Nor did the Lord Protector, actuated as he was at this time by the motives of the astute politician rather than by the feelings of the religious enthusiast, care to press the cause of religious toleration in the teeth of popular opposition; and yet he did not give the petitioners a formal dismissal. And so Rabbi Menasseh remained in London, but with far different hopes to those he cherished on his first arrival. On March 24 of the following year he again took part with six other Jews in presenting a petition to the Protector. The boons prayed for by the petitioners were now very small; they were two only, (1) protection in writing for meeting privately in their own houses for purposes of devotion; (2) a license to bury their dead in a convenient place without the city. But even this petition was not granted. It was referred to the consideration of the Council and no answer was ever returned to it. A few days later, on April 10, Menasseh published his *Vindiciae Iudaeorum*, his last effort to gain the cause he had come to plead. Speaking of the Conference he says: "Mens judgements and sentences were different. Insomuch, that as yet, we have had no finall determination from his Serene Highnesse. Wherefore those few Jewes that were here, despairing of our expected successe, departed hence. And others who desired to come hither, have quitted their hopes, and betaken themselves some to Italy, some to Geneva, where that Commonwealth hath at this time most freely granted them many and great priviledges[1]." But Menasseh, though his *Vindiciae* effected nothing, though no response came to his second petition with its very humble prayer, still stayed behind at his post, hoping against hope. In September, 1657, his son Samuel died in his house, and the pious father having solemnly promised to take his

[1] *Vindiciae Iudaeorum*, the seventh section.

mortal remains to Holland and lay them to rest in consecrated soil there, "at length with his heart ever broken with griefe on losing heer his only sonne and his presious time with all his hopes in this iland he got away with so much breath as lasted, till he came to Midleburg and then he dyed[1]." His mission had proved an utter failure.

H. S. Q. HENRIQUES.

[1] Petition of John Sadler to Richard Cromwell (S. P. Dom. Inter., cc. 8), and Petition from Menasseh to Oliver, Sept. 17, 1657 (S. P. Dom. Inter., clvi. 89), both printed in Wolf's *Menasseh Ben Israel's Mission to Oliver Cromwell*, p. lxxxvii.